IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.173/2005

Smt. Tecy Lourdes Figueiredo Dias
major, housewife,
daughter of late Shri T.M. Figueiredo,
Residing at House No.102, Churchwado,
Carmona, Salcete, Goa. . ..... Appellant.

V/s.

1) Smt. Sylvia Etelvina Figueiredo e Almeida, major, housewife and her husband

2) Shri Clifton Almeida, major, employed, both r/o. House No.245, D'Mello Vaddo, Carmona, Goa.

3) Shri Urbano Dias, major, landlord, r/o. Murida, Cuncolim, Goa.

4) Smt. Imaculado Figueiredo e Luis, major, housewife and her husband;

5) Shri George Luis, major, both r/o. Krishna Nivas Building, 4th floor, Room No.60, B. Master Road, Kalbadevi Road, Dhobitalao, Mumbai. ..... Respondents.

Mrs. A. A. Agni, Advocate for the appellant.

Mr. M. S. Usgaonkar, Senior Advocate with Ms. P. Kamat, Advocate for respondents No.1 and 2.

Ms. S. Linhares, Advocate for respondent No.3.

CORAM : P.V. KAKADE, J.

DATE : 8TH AUGUST, 2006.

ORAL ORDER :

Heard learned Counsel for both the parties. Perused the record. The appellant/plaintiff has preferred this appeal against the Judgment and Order passed by the Addl. District Judge, Margao allowing the respondents' appeal and setting aside the order passed by the Civil Judge, Sr. Division, Margao in Special Civil Suit No.360/1990 decided on 30.8.2004 and consequently, dismissing the suit.

2. The appellant/plaintiff came with a case that defendants No.1 and 2 had fraudulently obtained a Deed of Gift with regard to the property known as “RATMADEM” located at Village Carmona with a residential house bearing house No.245 and surveyed under Survey No. 10/1 and 270/25 of Village Carmona under the pretext of executing a power of attorney. Plaintiff No.1 is mother of plaintiff No.2 as well as defendants No.1 and 3. Defendants No.2, 4 and 5 are husbunds of defendants No.1, 3 and plaintiff No.2 respectively. Father of plaintiff No.2, defendants No. 1 and 3 by name Teodolino Figueiredo expired somewhere in the year 1989 and plaintiff No.1 is the widow of said Teodolino. It was further alleged that the said Teodolino and

plaintiff No.1 were in possession of the said property, which was possessed and enjoyed by them. According to the plaintiffs, plaintiff No.1 and her husband were not keeping good health and plaintiff No.1 was suffering from cancer like her husband. Taking advantage of the situation, defendants No.1 and 2 took up residence with the plaintiff No.1 and her late husband and refused to leave the same and tried to take forcible and fraudulent possession of the suit house. It was further alleged that defendants No.1 and 2 conspired to deprive the plaintiffs and other members of the family of their legitimate shares of the properties and obtained their signatures on a gift deed though under the pretext that they were obtaining signatures on a power of attorney only. Thereafter, the document was registered and subsequently, they started illtreating the plaintiff No.1 and forced the plaintiffs to leave the house and go to her brother where she came to know for the first time that defendants No.1 and 2 had got the gift deed executed under the pretext of executing power of attorney. A police complaint was lodged, but nothing happened. Thereafter, the present suit for permanent injunction came to be filed against the defendants restraining them from obstructing the plaintiffs from occupying or staying in the suit house and enjoying the suit property. Mandatory injunction was also claimed to the effect that defendants No.1 and 2 should be directed to vacate the premises.

The defendants appeared and challenged the suit, inter alia, denying all the allegations and sought dismissal of the suit.

3. On the basis of the available pleadings and the evidence on record, the learned trial Judge came to the conclusion that the plaintiffs had succeeded in proving that defendants No.1 and 2 were liable to be vacated from the suit property and they had fraudulently obtained the signatures of plaintiff No.1 and her husband on the gift deed on the pretext that it was the document of power of attorney and as such, the suit came to be dismissed. An appeal was carried to the District Court and the learned Addl. District Judge, Margao after hearing the parties and on appreciation of the evidence on record preferred to disagree with the trial Court and concluded that the plaintiffs had failed to prove the alleged fraud played by defendants No.1 and 2 while executing the gift deed. It was further held that the xerox copy of the gift deed could not be exhibited, as led in evidence and, as such, the appeal came to be allowed, holding that the plaintiffs failed to prove the alleged fraud. Hence, the present appeal.

4. At the outset, it may be noted that after hearing the learned Counsel for the appellants, it appears that the entire argument advanced on behalf of the appellants, revolves around the issue of fraud which is essentially a question of fact. The basic allegation of the plaintiffs is to the effect that the document which was executed by the plaintiff No.1 and her late husband was to their understanding a power of attorney and not the gift deed and,

therefore, the said document of gift deed is null and void and hence, the consequent possession and effect thereof should be held to be illegal. Firstly, I must note that there is nothing on record to show that for what purpose the plaintiffs willingly executed the power of attorney in favour of defendants No.1 and 2, because there is no allegation on record that their signatures on the alleged power of attorney were also obtained by fraud or force. Therefore, it could not be said that the relationship between the parties was strained, but the plaintiff No.1 and her late husband quietly and willingly signed the so called power of attorney. The learned Counsel for the appellants tried to explain the situation submitting that the power of attorney had to be executed as the daughters of plaintiff No.1 were married and for some other specific purpose. Be that as it may, the fact remains that there is nothing on record to show that any fraud was committed by the defendants while plaintiff No.1 and her late husband executing the document of gift deed, especially when it is a registered document.

The substantial question of law sought to be raised in this regard is to the effect whether the execution of the gift deed could be said to have been proved in terms of Section 68 of the Indian Evidence Act, which requires examination of the attesting witnesses for proof of execution of a document. A plain meaning of this question sought to be raised at this stage discloses that this is a question of fact. Moreover, the document was in fact registered and, therefore,

presumption in that regard must be raised in favour of the defendants, especially in the absence of any evidence to the contrary, on record. It is clear enough that the reasoning adopted by the lower appellate Judge is on proper appreciation of evidence and, therefore, no interference in any manner whatsoever is called for when the evidence on record is properly assessed.

5. The Apex Court in the case of **Sir Chunilal V. Meht and Sons Ltd. vs. Century Spinning and Manufacturing Company Ltd.,** AIR 1962 SC 1314 has held :

> " The proper test for determining whether a question of law raised in the case is substantial would be whether it is general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or it is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law. "

This view taken in the year 1962 has radically been reviewed, especially after the amendment of the Code of Civil Procedure in the year 1976. In the case of **Hari Singh vs. Kanhaiya Lal,** (1999) 7 SCC 288, the Apex Court has observed that the purpose of amending Section 100 by the 1976 amending Act was to further limit the jurisdiction of the High Court. Prior to the amendment, the interference could have been where an order was contrary to law or some usage having the force of law. But now it can only be if any substantial question of law arises. Therefore, now the interference cannot be only because the order is contrary to law, but when the disputed issues raise a substantial question of law. Creation of powers or limiting such powers in the appellate authorities is always a decision based on public policy expressed in the maxim i*nterest reipublicae ut sit finis litium*. This policy brings to finality some issues or a litigation at some point of time. If no appeal is provided, the original order becomes final. Thus it is open for the legislature to bring finality to the adjudication on question of facts up to the stage of first appeal and limit the second appeal to question of law or to the substantial question of law or to such other limitation which the legislature deems fit and proper.

Again, the Apex Court in the case of **Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar and ors.,** (1999) 3 SCC 722, has observed that :

“It is not within the domain of the High Court

> to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate Court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal"

As already stated, that is what has happened in the present case. This is especially so when, as pointed out earlier, the entire issue revolves around the alleged fraud committed by the defendants No.1 and 2 by obtaining signatures of the plaintiff No.1 and her late husband on the document which is proved to be the document of gift deed which is duly registered.

6. The learned Counsel appearing for the appellants, thereafter, sought to raise various other aspects, including the scope of Section 65 as well as 68 of the Evidence Act in support of her submission regarding admissibility of the document. It was also urged

that the finding recorded by the lower appellate Court in that regard amounts to perversity. However, on perusal of the entire reasoning adopted by the lower appellate Court Court, I am satisfied, as noted earlier, that when two views are possible on same set of facts, then the view taken by the lower appellate Court which is the last court of fact, is binding on the High Court. In the facts and circumstances, therefore, no interference is called for. The appeal has to be, therefore, dismissed and is, hereby, dismissed with no order as to costs.

Consequently, the Civil Application No365/2005 also stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.